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No. 626

In the Supreme Court of the United States

OCTOBER TERM, 1959

LOUIS FIANO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,

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Assistant Attorney General,

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OPINION BELOW

The opinion of the court of appeals (Pet. App. B) is reported at 271 F.2d 883.[1]

JURISDICTION

The judgment of the court of appeals was entered on October 22, 1959 (Pet. App. C). A petition for rehearing was denied on December 7, 1959. The petition for a writ of certiorari was filed on January 4, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1] The opinion on a motion for bail is reported at 259 F. 2d 135.

QUESTION PRESENTED

Whether the indictment, which charged that petitioner had unlawfully sold heroin, a narcotic drug which petitioner knew had been imported into the United States contrary to 21 U.S.C. 174, was subject to attack after affirmance of the conviction on the ground that it failed specifically to state that petitioner knew that the drug had been imported "contrary to law."

STATUTES INVOLVED

21 U.S.C. 173, provides in part:

> It is unlawful to import or bring any narcotic drug into the United States or any territory under its control or jurisdiction; except that such amounts of crude opium and coca leaves as the Commissioner of Narcotics finds to be necessary to provide for medical and legitimate uses only may be imported and brought into the United States or such territory under such regulations as the Commissioner of Narcotics shall prescribe, but no crude opium may be imported or brought in for the purpose of manufacturing heroin. * * *

21 U.S.C. 174, provides in part:

> Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or

> brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. * * *

STATEMENT

In the District Court, petitioner was convicted of a violation of 21 U.S.C. 174 by selling and facilitating the sale of 17 ounces, 150 grains of heroin. He was sentenced to imprisonment for 20 years and fined $20,000. On appeal, the conviction was affirmed.

Thereafter, in a petition for rehearing, petitioner for the first time challenged the validity of the indictment for failure to specify that petitioner knew the narcotics had been imported contrary to law. The petition for rehearing was denied.

ARGUMENT

The sole issue which petitioner raises is the validity of the indictment, which he challenged for the first time by a petition for rehearing in the court of appeals.

The indictment charged in pertinent part (Pet. App. E.) that petitioner

> knowingly and unlawfully sold and facilitated the sale to Stephen F. Giorgio of 17 ounces, 150 grains of heroin, a narcotic drug, which, as the defendant then and there well knew, had been imported into the United States of America con-

trary to United States Code, Title 21, Section 174.

Petitioner argues that the indictment is fatally defective, so as to be subject to attack even after his conviction has been affirmed, because it fails to state that he knew the drug had been imported contrary to law. He argues that the allegation "contrary to United States Code, Title 21, Section 174" cannot be deemed to charge that petitioner knew that the narcotics were imported "contrary to law". The indictment, however, charged that petitioner sold heroin which, under 21 U.S.C. 173, *supra*, must have been illegally imported, either in itself or because the materials for its manufacture were unlawfully imported. Since 21 U.S.C. 174 makes it illegal to sell any narcotic drug, knowing the same to have been illegally imported, the indictment did charge petitioner with knowledge that the heroin was imported "contrary to law." An indictment is not required to use the specific wording of the statute, as long as it adequately gives the defendant notice of the crime with which he is charged. The indictment here plainly satisfied that standard.

This Court said long ago, in *Hagner* v. *United States*, 285 U.S. 427, 433, that "Upon a proceeding after verdict at least, no prejudice being shown, it is enough that the necessary facts appear in any form, or by fair construction can be found within the terms of the indictment". That test is more than adequately met here.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.

MALCOLM R. WILKEY,
Assistant Attorney General.

BEATRICE ROSENBERG,
Attorney.

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PETITIONER'S REPLY BRIEF

IN THE

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OCTOBER TERM, 1959

No. 626

LOUIS FIANO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITIONER'S REPLY BRIEF

Respondent argues in its opposing brief that the omission in the indictment is cured by virtue of inferential incorporation in the indictment of the provisions of a section of the United States Code not referred to in either the indictment or the section on which the indictment was based. Respondent further contends that in any event the error was not substantial and should be disregarded. On both points, the cases specifically hold against respondent.

The Presence of the Word *Heroin* in the Indictment Does Not Remedy the Omission of an Element of the Offense in the Indictment.

The Government, by its failure to discuss the point, apparently concedes petitioner's argument that the citation of Section 174 in the body of the indictment

is a nullity insofar as it purports to be an allegation of an element of the offense. The Government then seeks to remedy the consequent omission by relying on the presence of the word *heroin* in the indictment.

It has long been the law that an element of an offense must be charged directly and not by inferential incorporation by reference.[1] Indeed, the means suggested by the Government to remedy its error only serves to emphasize the departure from the accepted and usual course of judicial proceedings necessary to uphold this indictment.

The attention of the Court is directed to *United States* v. *Calhoun*, 257 F. 2d 673 (7th Cir. 1958) and *Robinson* v. *United States*, 263 F. 2d 911 (10th Cir. 1959).[2] In both cases the narcotic drug involved was heroin, and the word *heroin* appeared in the indictments. Nevertheless, failure to properly allege that the defendants knew that the heroin had been imported contrary to law required reversals of the convictions, for the reason that an element of the offense was not alleged.

Were the Government view to be adopted, the words of Section 174, "knowing the same to have been imported or brought into the United States contrary to law, . . . ", would be necessarily reduced to mere surplusage in any case involving heroin. The Government obviously cannot thus vitiate an element of an offense specifically required by Congress. Indeed, to permit such interpretation would raise serious consti-

[1] See the discussion of *United States* v. *Hess*, 124 U. S. 483, on pages 7-8 of the petition.

[2] Both cases were cited on page 10, footnote 8, of the petition.

tutional questions, since the element of unlawful importation into the United States is probably the sole basis for federal jurisdiction.

The Error is Substantial and Cannot Be Disregarded

The Government relies heavily on a general quotation from *Hagner* v. *United States*, 285 U. S. 427. In the case at bar we are dealing with the complete omission of an element of the offense. In the *Hagner* case all of the elements were alleged and a mere question of particularity was in issue. In addition to the excerpt cited by respondent, however, the Court also said,

> "The true test of the sufficiency of an indictment is not whether it could have been made more definite and certain, *but whether it contains the elements of the offense intended to be charged*, . . . " (at page 431) (Italics added)

This language was restated in *United States* v. *Debrow*, 346 U. S. 374.[3]

The Courts have clearly held that failure to allege an element of an offense is substantial error and cannot be disregarded. In *United States* v. *Calhoun*, *supra*, the Court stated,

> "The core of this reversible error is the omission, not the class of omission. U. S. Const. Amend. VI. Rule 7, Federal Rules of Criminal Procedure, 18 U. S. C. is unavailing in this situation and the failure to challenge the indictment at the trial level is unimportant, on this record, because count 5 omitted an element of the offense. Rule 12 (b) (2), Federal Rules of Criminal Procedure,

[3] This case was cited on page 5 of the petition.

18 U. S. C. We are reluctant to reverse a judgment on account of this defect, but it must be done where there is more than an obvious technicality, and one which cannot be disregarded under Rule 52 (a), Federal Rules of Criminal Procedure, 18 U. S. C., as a 'harmless error'. *United States* v. *Mannszak*, 3 Cir., 1956, 234 F. 2d 421." (at page 680)

See also *Robinson* v. *United States*, *supra*.

Conclusion

The mere presence of the word *heroin* in the indictment does not constitute an allegation that the defendant knew that the narcotics were imported contrary to law. The indictment fails to charge an offense by virtue of its failure to charge an element thereof. Failure to charge an offense is substantial error that cannot be disregarded, although not raised at the trial. The sufficiency of this indictment presents an important question in the administration of federal criminal law. We submit that the writ should be granted.

Respectfully submitted,

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February 4, 1960